IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2846 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DEPUTY SECRETARY - Petitioner(s)
Versus
DEVRAMBHAI KHANDUBHAI CHOWDHARY - Respondent(s)

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Appearance :
MR SIRAJ GORI, AGP for Petitioner(s) : 1, 1.2.1, 1.2.2, 1.2.3,1.2.4
MR IS SUPEHIA for Respondent(

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 04/08/2006

ORAL JUDGMENT

1. Heard learned AGP Shri Gori for the petitioners and learned advocate Shri Supehia for the respondents.

2. The State Government has challenged the decision dated 12th April 2002 passed by the Gujarat Civil Services Tribunal in Appeal No.367/99 filed by the respondent.

3. The respondent was in Government service. He was appointed on work-charge post of Wireman on 6.11.65. He remained on leave without authority from 10.10.76 to 30.6.77. He resumed his duty on 1.7.77 and retired on superannuation on 31.8.88. Upon retirement, his pensionary benefits were not counted on the basis of the entire length of service. He, therefore, approached the Government in this regard. The Government, however, turned down the request of the employee. A communication in this regard was issued to him on 18th November 1997, which, inter alia stated that he had not discharged his duties in excess of 120 days and this break therefore cannot be condoned. He was, therefore, granted reappointment. His pensionable service, therefore, was calculated from 1.7.77. It was this decision which the employee challenged before the Service Tribunal. The

Tribunal by its impugned order allowed the appeal and the communication dated 18.11.97 was quashed. The entire service of the employee was ordered to be counted as continuous service for the purpose of pensionary benefits treating the period from 10.10.76 to 30.6.77 as extra-ordinary leave.

4. Learned AGP Shri Gori assailed the order passed by the Tribunal on various grounds suggesting that the employee cannot retain the benefits of past service when there was a break in service for a period in excess of eight months. The employee had remained unauthorizedly absent. He submitted that the Tribunal did not take into account the material produced by the Government on record.

5. On the other hand, learned advocate Shri Supehia appearing for the respondent supported the order of the Tribunal and submitted that even if the period during which the employee was away from duty may not count towards pensionary benefits, his past service could not have been wiped out.

6. Having heard the learned advocates appearing for

the parties, it would appear that though there is an assertion in the impugned communication that the respondent was granted fresh appointment, the Tribunal as a matter of fact has come to the conclusion that there is no material in support of this contention. The question therefore is whether the entire past service of the respondent could have been wiped out for the purpose of pensionary benefits. It is not in dispute that the Government had not taken any disciplinary action against the respondent in the form of inquiry nor any penalty imposed on him for his alleged unauthorized absence. In that view of the matter, if the absence of the employee is treated as break in service so as to nullify his past service, the same would result into miscarriage of justice. Even by resolution dated 25th January 1978, the Government itself has clarified as to the manner in which such absent periods are to be treated. Para 2 of the said resolution reads as follows:-

> “2. Break in Service. Service from the date of entry to the date of retirement should be

treated as continuous for the purpose of working out the qualifying service unless there are specific entires regarding break in service. Where there are no specific entires regarding break in service, it will be presumed that the service was continuous. The period between two spells of service should be counted as qualifying service if the period is 3 months or less. If, the period of break is more than 3 months, the entire period of such break should be disregarded for working out the qualifying service. Unless specific entries exist in the Service Book that the break in service was on account of removal, dismissal or resignation, all previous service should be taken as qualifying service."

7. It can thus be seen that though the period of absence may constitute break in service to the extent of the said period, the same cannot be applied in a manner whereby, the past services of the employee can be wiped out for the purpose of pensionary benefits. To this extent, the Tribunal committed no error. The respondent, however, cannot claim pensionary benefits for the period during which he was not in active service.

8. In the result, it would be necessary for the Government to recalculate the pensionary benefits of the respondent counting his total actual service as pensionary service and recalculate the pension and pay the same accordingly. Subject to the above modification, the order of the Tribunal is upheld. The petition stands disposed of accordingly. Rule is discharged with no order as to costs.

(Akil Kureshi, J.)

(vjn)